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From the Desk of  
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September 15, 2010

Mr. Corbin Davis  
Clerk, Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

Re: Administrative File No. 2010-16

Dear Mr. Davis and Justices of the Court:

I am writing to comment on Administrative File No. 2010-16, which concerns the possibility of amending MCR 6.302 in light of the United States Supreme Court decision in *Padilla v Kentucky*.

*What did Padilla hold?*

First, *Padilla* has nothing to do with an understanding, voluntary, and accurate plea under constitutional principles and MCR 6.302. This court need do nothing in response to *Padilla*—the case does not *require* any amendment to our court rules as would be required to insure that a defendant is pleading understanding that he or she is giving up some right, such as the right, for example, to be presumed innocent. *Padilla* is an ineffective assistance of counsel case. It delineates certain responsibilities of *counsel*, not the court, in counsel's representation of his or her client.

Second, the responsibility of counsel established in *Padilla* concerns *deportation*. It does not concern “exclusion from admission to the United States, or denial of naturalization under the laws of the United States” (Alternative B). While it is true that the opinion uses, at one point, the phrase “adverse immigration consequences,” the context of its use of that phrase matters: “When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But *when the deportation consequence is*

*truly clear*, as it was in this case, the duty to give correct advice is equally clear.” *Padilla*, 130 Sct at 1483. Thus, where there is uncertainty as to what may follow as a possible consequence of the plea the attorney must warn only of “adverse immigration consequences,” but where deportation is required under the law that advice must be given. Further, the Court repeatedly refers to “deportation” as the basis of its holding:

- We agree with *Padilla* that constitutionally competent counsel would have advised him that his conviction for drug distribution made him *subject to automatic deportation*.
- . . . changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. . . . These changes confirm our view that, as a matter of federal law, *deportation* is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.
- We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally “reasonable professional assistance” required under *Strickland*. . . . Whether that distinction is appropriate is a question we need not consider in this case *because of the unique nature of deportation*.
- We have long recognized that deportation is a particularly severe “penalty”. . . importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction *in the deportation context*.
- Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. *We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel*.
- The weight of prevailing professional norms supports the view that counsel must advise her client *regarding the risk of deportation*.

- There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But *when the deportation consequence is truly clear*, as it was in this case, the duty to give correct advice is equally clear.
- The severity of deportation—“the equivalent of banishment or exile,” *Delgadillo v. Carmichael*, 332 U.S. 388, 390-391, 68 S.Ct. 10, 92 L.Ed. 17 (1947)—only underscores how critical it is for *counsel to inform her noncitizen client that he faces a risk of deportation*.
- . . . *we now hold* that counsel must inform her client *whether his plea carries a risk of deportation*.

*Why amend the rule at all?*

Because *Padilla* is an ineffective assistance case, imposing no duty on the judiciary, why amend the rule at all?—both to assist in insuring that noncitizen defendants have that advice required by the 6<sup>th</sup> Amendment counsel right, and as a matter of judicial self-defense; that is, to protect judgments which have, in terms of the process required, been properly entered.

I favor Proposal A, as B introduces matter beyond the reach of *Padilla*, and I think it inadvisable to proceed in that fashion (it also requires the advice be given without regard to whether the defendant is a noncitizen, and as to citizens, counsel owes no “performance” to the client in this regard)—I fear the possibility of unintended consequences. I have heard it said that the advice (or perhaps more accurately the “warning”) should be given in all cases, as the defendant may not wish to admit he or she is a noncitizen. Given that, under *Padilla*, defendant’s counsel *has* to know whether defendant is a citizen or not, and given that the defendant is only entitled to what might be termed “*Padilla* performance” if he or she is a noncitizen, disclosure of that fact does not seem to me to be untoward. And the goal here is not to avoid deportation, but to be sure the noncitizen is adequately advised by counsel—after all, a conviction at trial, for what might be a more serious offense if a plea offer is foregone, will also certainly have the deportation consequence the plea would have. If the federal government is viewed as being overly harsh on deportation, that is a fight that must be waged with ICE and Congress. But I certainly would not have any objection to

Alternative A being “tweaked” to have the court first ask *counsel* whether the defendant is or is not a citizen, as follows:

(E) Additional Inquiries. On completing the colloquy with the defendant, the court must . . . .

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(2) ~~if the defendant is not a citizen of the United States~~, ask the defendant’s lawyer *if the defendant is a citizen of the United States, and, if not, ask the defendant’s lawyer* and the defendant whether they have discussed the possible risk of deportation that may be caused by the conviction. If it appears to the court that no such discussion has occurred, the court may not accept the defendant’s plea until the deficiency is corrected.

Thank you for your consideration of my comments (I should also note that like most criminal law practitioners, I am no expert on the law concerning deportation, but I believe Judge Hogg’s concerns regarding misdemeanor pleas are likely well taken).

Very truly yours,

TIMOTHY A. BAUGHMAN  
Chief, Research, Training, and Appeals